IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 4TH DECEMBER 2007 / 13TH AGRAHAYANA 1929

RSA.No. 1227 of 2006()

AS.123/2005 of I ADDL.DISTRICT COURT, ERNAKULAM
OS.107/2003 of ADDL.SUB COURT, KOCHI
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: APPELLANT/APPELLANT/DEFENDENT.

P.S.SANTHOSH, AGED 46 YEARS,
S/O.SANKARANKUTTY ELAYIDOM,
C.C.XII/2896, PALLURUTHI THEKKUM MURI,
PALLURUTHY, KOCHI-6.

BY ADV. SRI.A.T.ANILKUMAR

RESPONDENTS: RESPONDENT/PLAINTIFF.

P.VENU, AGED 36 YEARS,
VII/47,MATTANCHERRY,
KOCHI-2.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 04/12/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.2901/2006 IN R.S.A.No.1227/2006

4.12.2007 DISMISSED Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO.1227 OF 2006

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Dated this the 4th day of December,2007

JUDGMENT

Defendant in O.S.107/2003 on the file of Sub Court, Kochi is the appellant. Plaintiff is the respondent. Respondent instituted the suit for specific performance of Ext.A1 agreement dated 19.2.2001. Under Ext.A1, appellant agreed to sell plaint schedule property to respondent for a consideration of Rs.1,50,000/-. The property belongs to appellant under Ext.A2 sale deed. Respondent contended that inclusive of the advance amount of Rs.50,000/- Rs.1,42,000/- was paid. The period of Ext.A1 agreement was extended on 19.10.2001. It was contended that eventhough respondent was ready and willing to perform his part of the agreement, appellant did not execute the sale deed and inspite of notice, he did not execute the document and therefore respondent is entitled to a decree for specific performance of

the agreement for sale. Appellant resisted the suit admitting execution of Ext.A1 but contending that it was not executed for the purpose of sale. According to appellant, he borrowed Rs.1,00,000/- from the respondent and towards its security Ext.A1 was executed and he did not receive Rs.1,42,000/- as claimed and Ext.A1 was executed for the amount borrowed and the interest payable. It was also contended that subsequently on 6.9.2001 he paid Rs.14,000/-, on 25.4.2001 Rs.40,000/-, and on 28.5.2002 Rs.10,000/- was paid towards interest and on 8.8.2002 Rs.20,000/- was paid and a cheque for Rs.50,000/- was also issued in the account of appellant maintained at Catholic Syrian Bank, Thoppumpady Branch which was encashed by respondent and only Rs.30,000/- the balance amount is due and respondent is not entitled to a decree for specific performance of the agreement for sale.

2. Learned Sub Judge on the evidence of PW1, DW1 and 2 and Exts.A1 to A8 disbelieved the case of appellant that Ext.A1 was executed as security for the loan. On the other hand, it was found under Ext.A1 appellant agreed to sell the plaint schedule

property for the amount shown therein and he received the consideration as claimed by respondent. Learned Sub Judge also found that there is no evidence to prove the discharge pleaded and though Ext.X1 cheque allegedly issued to respondent was sought to be proved by examining DW2, the Manager of the Bank, evidence show that Ext.X1 cheque though issued in the name of the respondent was encashed by C.T. Varghese and there is no evidence to prove that the amount was withdrawn by respondent and therefore disbelieved the case of discharge. Learned Sub Judge on the evidence also found that respondent is not entitled to a decree for specific performance of the agreement and is only entitled to a decree for return of the advance amount paid and directed appellant to pay Rs.1,42,000/- with interest at 18% till the date of decree and thereafter at 6% per annum. The judgment was challenged by appellant before District Court, Ernakulam in A.S.123/2005. Learned District Judge on reappreciation of evidence confirmed the findings of learned Sub Judge that Ext.A1 was not executed

as security. So also finding that discharge was not proved was confirmed. Learned District Judge reduced the interest till the date of the suit at 12% per annum from 18% and thereafter at 6% and confirmed the judgment on all other aspects. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard.

4. Argument of learned counsel is that courts below should have found that for the reason that appellant did not examine the attesting witnesses to Ext.A1, should not have accepted the case of respondent or rejected the case of appellant that Ext.A1 was executed as security and instead should have found that burden is on respondent to prove that it is an agreement for sale and not security for the loan. It was also contended that courts below should have accepted the discharge evidenced by Ext.X1 cheque, especially when DW2 was examined.

5. On hearing the learned counsel, I do not find that any substantial question of law is involved in the appeal.

6. Execution of Ext.A1 is admitted. Ext.A1

shows that it is an agreement for sale. Therefore burden is on appellant and not on the respondent, to prove that Ext.A1 was not executed as it purported to be but as a security for the loan received by the appellant from respondent. Apart from appellant, no other evidence was adduced. The evidence of the appellant does not establish his case that it was executed towards security of the loan. On the evidence, courts below rightly found that Ext.A1 is not an agreement executed as security.

7. As courts below did not grant a decree for specific performance of the agreement and instead granted a decree for realisation of the advance amount paid, the only question is whether appellant has established the discharge pleaded. There is no evidence to prove other discharge except Rs.50,000/- evidenced by Ext.X1 cheque. The evidence of DW2 the Manager of the Bank was relied on by learned counsel to prove that Rs.50,000/- was paid to respondent under Ext.X1. Courts below on the evidence of DW2 and Ext.X1 found that Ext.X1 was a bearer cheque and though it was issued in the

name of P.Venu, it was proved that it was encashed by C.T.Varghese. Learned counsel argued that said Varghese is the son of the sister of respondent and therefore it is a valid discharge as there was no other transaction between appellant and Varghese. But there is no evidence to prove that Varghese who encashed Ext.X1 cheque is the relative of the appellant or that it was for respondent. Courts below on the evidence found that being a bearer cheque, unless there is evidence to prove that Ext.X1 was encashed by respondent, it is insufficient to prove the discharge. Findings are correct. I find no substantial question of law involved in the appeal. Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006